

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JEFF W. GIBSON)	
Claimant)	
)	
VS.)	
)	
HONEYWELL AEROSPACE ELECTRONICS)	
Respondent)	Docket No. 1,033,149
)	
AND)	
)	
INDEMNITY INS. CO. OF NORTH AMERICA)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier (respondent) request review of the August 20, 2007 preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

ISSUES

The Administrative Law Judge (ALJ) found the claimant sustained injury arising out of and in the course of his employment with the respondent on January 26, 2007.¹ The ALJ went on to authorize Dr. Eyster as the claimant's treating physician and payment of the outstanding bills from the emergency room and subsequent hospitalization to be paid. All other medical bills were denied pending a full hearing. In granting claimant's request, the ALJ specifically concluded that although claimant had "an extensive history of back problems and a number of other accident claims" it is, standing alone, not a defense to this claim.² He further reasoned that "[t]he fact that [c]laimant accepted a settlement of a workers compensation case in 2000, including an amount dedicated for future medical is not evidence that the [c]laimant did not sustain another accident in 2007."³

¹ ALJ Order (Aug. 20, 2007) at 1.

² *Id.*

³ *Id.*

The respondent requests review of the compensability of the claimant's claim. Respondent contends the claimant's present alleged injuries to his neck and right arm as well as his low back and right leg are not compensable because they are the natural, direct and probable consequence of his pre-existing condition in his low back.⁴ Respondent also argues that the claimant's accident is not compensable because it was a result of normal day-to-day activity and did not arise out of the claimant's employment.

Claimant argues that the order should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Undersigned Board Member makes the following findings of fact and conclusions of law:

As noted by the ALJ, there is no dispute that claimant has a lengthy history of low back problems starting in 1993. At least two of his accidents were work-related and a third was the result of an automobile collision. Each of these events involved claimant's low back, a period of treatment and some of them required significant time away from work. But in each instance, he returned to work.

Then, on January 26, 2007, claimant became injured while adjusting a hydraulic chair. Although respondent denies there being any defect in the chair, there is nonetheless no credible dispute that claimant fell while adjusting this chair. The heart of the parties' dispute stems from whether claimant's present complaints are attributable to a new accident on January 26, 2007, or as a result of one or more of his earlier injuries.

Claimant was taken from the respondent's worksite to the emergency room on the day of the accident. From there he was referred to Dr. Mark S. Dobyns. Claimant saw Dr. Dobyns on February 2, 2007 and was diagnosed with lumbar sprain, cervical sprain and lumbar contusion. Dr. Dobyns' office records note that claimant told him he was injured while adjusting his chair at work.⁵ Claimant was taken off work for a few days and underwent a CT scan.

Claimant then saw Dr. Robert L. Eyster on May 9, 2007 for evaluation of his neck and lower back pain. Dr. Eyster recommended that the claimant have an MRI of his right arm and leg due to his complaints of radicular pain in these areas. He also recommended epidural injections, noting the claimant's prior two surgeries to the L5-S1 region. Dr. Eyster has opined that the claimant had a pre-existing condition that made him more susceptible

⁴ Respondent's Brief at 7 (filed Sept. 18, 2007).

⁵ P.H. Trans., Cl. Ex. 1 at 5 (Dr. Dobyns Feb. 2, 2007 report).

to having problems with the activity he was doing during his work process.⁶ Dr. Eyster has also likened the act of bending down to adjust a chair to the process of tying one's shoe and has further indicated that "but for his [claimant's] pre-existent condition, his size and so forth, then the simple mechanism of the work injury would not have caused this sequelae."⁷

Claimant saw Dr. Pedro Murati at the request of his lawyer on July 5, 2007, and he opined that the claimant's symptoms were related to the work injury he sustained on January 26, 2007 while in respondent's employment.⁸ Dr. Murati recommended that the claimant stay off work and undergo physical therapy and receive cortisone injections and NCS/EMG testing.

When the treatment outlined by Dr. Murati was not forthcoming and the bills associated with his ER visit and treatment with Dr. Eyster remained unpaid, a preliminary hearing was held. Following the presentation of evidence, including a DVD depicting a pregnant woman's successful attempt to adjust the allegedly defective hydraulic chair, the ALJ entered an order granting claimant's request for treatment.

This member of the Board has considered the evidence contained within the record⁹ and concludes the ALJ's preliminary hearing Order should be affirmed.

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.¹⁰ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.¹¹

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the

⁶ *Id.*, Resp. Ex. 1 at 1 (June 6, 2007 letter).

⁷ *Id.*

⁸ *Id.*, Cl. Ex. 3 at 4 (IME Report).

⁹ It is worth reminding the parties that it is wholly unnecessary to include volumes of medical records, most of which are wholly irrelevant to the pending dispute. It merely slows down the review process.

¹⁰ K.S.A. 2006 Supp. 44-501(a).

¹¹ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

employment. An injury arises 'out of' employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.¹²

It is well settled in this state that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.¹³ The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.¹⁴

There is no evidence to contradict claimant's contention that he was adjusting the hydraulic chair. The individual who demonstrated this maneuver may not have had the same difficulties, but clearly claimant had some problem and fell as a result. In the course of his fall, he struck his neck and shoulder, then came to rest on the floor.

The medical evidence certainly supports the fact that claimant was injured in this accident, aggravating his low back condition as well as the onset of new complaints to his neck and shoulder. Dr. Eyster even recognized that claimant was "more susceptible" to having low back symptoms with his work activities. This Board Member agrees with the ALJ's statement that the mere fact that earlier injuries were sustained do not, standing alone, provide an absolute defense to this claim. Based upon the evidence at this juncture of the claim, this Board Member finds that claimant has sustained his burden of establishing a compensable claim and the ALJ's preliminary hearing Order is hereby affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.¹⁵ Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

¹² *Id.*

¹³ *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984); *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

¹⁴ *Hanson v. Logan U.S.D.* 326, 28 Kan. App.2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App.2d 510, 949 P.2d 1149 (1997).

¹⁵ K.S.A. 44-534a.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Thomas Klein dated August 20, 2007, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of October 2007.

BOARD MEMBER

c: Phillip R. Fields, Attorney for Claimant
Clifford K. Stubbs, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge